Supreme Court, U. S.
FILED
APR 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1722

JOHN W. PITSENBERGER,
Appellant,

v.

MARY W. PITSENBERGER,
Appellee.

ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

JOHN G. GILL, JR.
ELLEN ANN CALLAHAN
17 West Jefferson Street
Rockville, Maryland 20850
(301) 340-9444
Attorneys for Appellant

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES 2

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

THE QUESTIONS ARE SUBSTANTIAL 7

I. The Maryland Law at Issue Violates the Due Process Clause of the Fourteenth Amendment in That It Fails To Provide for a Meaningful Hearing Before Dispossessing Spouse of His Real Property 7

II. The Maryland Law at Issue Permits the Unlawful Taking of Private Property Without Just Compensation in Violation of the Fifth and Fourteenth Amendments 10

III. This Case Is Important 12

CONCLUSION 14

APPENDICES:

A. Opinion of the Court of Appeals of Maryland 1a

B. Opinion of the Circuit Court for Montgomery County, Maryland 17a

C. Notice of Appeal 21a

D. Subtitle 6A. Property Disposition in Divorce and Annulment, Courts and Judicial Proceedings, Annotated Code of Maryland 23a

Section 3-6A-01 ..... 23a

Section 3-6A-06 ..... 24a

Section 3-6A-07 ..... 26a

Rules of the Sixth Judicial Circuit of Maryland, Rule S74 ..... 27a

TABLE OF AUTHORITIES

Cases: Page

Bell v. Burson, 402 U.S. 535 (1971) 2, 7, 8

Bianchi v. Morales, 262 U.S. 170 (1923) 8

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 8

Causby v. United States, 328 U.S. 256 (1946) 12

Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897) 10

Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) 9

Fahey v. Mallonee, 332 U.S. 245 (1947) 9

Fuentes v. Shevin, 407 U.S. 67 (1972) 2, 7, 9

Goldberg v. Kelly, 397 U.S. 254 (1970) 7

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) . . 7

Lindsey v. Normet, 405 U.S. 56 (1972) 8

North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) 9

Penn. Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 11

United States v. General Motors Corp., 323 U.S. 373 (1945) 2, 10, 11

Constitutional Provisions:

Fifth Amendment, United States Constitution 1, 3, 4, 6, 10

Fourteenth Amendment, United States Constitution 1, 3, 4, 6, 7, 9, 10

Statutes and Rules:

Section 3-6A-06, Courts and Judicial Proceedings, Annotated Code of Maryland 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13

Rules of the Sixth Judicial Circuit of Maryland, Rule S74 . . 3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

JOHN W. PITSENBERGER,

Appellant,

v.

MARY W. PITSENBERGER,

Appellee.

ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

John W. Pitsenberger, appellant, appeals from the final judgment of the Court of Appeals of Maryland, dated January 31, 1980, holding that Section 3-6A-06, Courts and Judicial Proceedings, Annotated Code of Maryland, is not unconstitutional as violative of appellant's rights to due process and to just compensation guaranteed by the Fourteenth and Fifth Amendments of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland, which appears in the appendix hereto, p. 1a, *infra,* is reported unofficially at 410 A.2d 1052 (1980).

The opinion of the Circuit Court for Montgomery County, Maryland is reprinted in the appendix hereto, p. 17a, *infra.*

JURISDICTION

The judgment of the Court of Appeals of Maryland upholding the validity of a Maryland statute was filed on January 31, 1980.

A notice of appeal to this Court was duly filed in the Circuit Court for Montgomery County, Maryland, the court possessed with the record, on April 21, 1980. *See* p. 21a, *infra.*

This appeal is being docketed in this Court within 90 days from the filing of the opinion below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Cases believed to sustain jurisdiction are: *Fuentes v. Shevin,* 407 U.S. 67 (1971); *Bell v. Burson,* 402 U.S. 535 (1970); *United States v. General Motors Corp.,* 323 U.S. 373 (1945).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The statute, the validity of which is questioned, is Section 3-6A-06 of the Maryland Property Disposition in Divorce and Annulment Act. It can be found in the Courts and Judicial Proceedings Volume of the Annotated Code of Maryland, 1979 Supplement, pgs.

70-71.[1] The full text of this section is set forth in the appendix hereto, p. 23a, *infra.*

Constitution of the United States of America, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Constitution of the United States of America, Amendment XIV:

> . . . [N]or shall any State deprive any person of life, liberty, or property without due process of law; . . .

Courts and Judicial Proceedings, Annotated Code of Maryland, Section 3-6A-01.

Courts and Judicial Proceedings, Annotated Code of Maryland, Section 3-6A-07.

Rules of the Sixth Judicial Circuit of Maryland, Rules S74.

QUESTIONS PRESENTED

1. Whether Section 3-6A-06, Courts and Judicial Proceedings, Annotated Code of Maryland, which permits a *pendente lite* award of the family home to a petitioning spouse without a preliminary determination that there exist grounds for divorce or that the evicted spouse presents a danger to the health, safety, and welfare of

---

[1] Subsequent to the Circuit Court decision in this case, the Maryland Property Disposition in Divorce and Annulment Act was amended and incorporated into the most recent Courts and Judicial Proceedings Volume of the Annotated Code of Maryland. These amendments do not affect this appeal. The revised statute can be found in Md. Cts. & Jud. Proc. Code Ann. § 3-6A-06, pgs. 118-119.

the petitioning spouse or the children of the parties, violates the due process clause of the Fourteenth Amendment of the United States Constitution?

2. Whether Section 3-6A-06, Courts and Judicial Proceedings, Annotated Code of Maryland, permits the unlawful taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

STATEMENT OF THE CASE

Appellant John W. Pitsenberger is married to Appellee Mary W. Pitsenberger. They own a home located in Rockville, Maryland as tenants by the entirety. In August of 1978, appellee left the family home taking two of the parties' five children with her (John C. and Alison) and $10,000.00 from the parties' joint savings. In September 1978, the other three children of the parties (Guendolen, Deirdre, and Jennifer) began residing with appellee.

On January 2, 1979, appellee filed a bill of complaint for divorce *a mensa et thoro* seeking, *inter alia,* a use and possession order for the family home and family use personal property pursuant to Section 3-6A-06, Courts and Judicial Proceedings, Annotated Code of Maryland[2] (effective January 1, 1979).

On February 16, 1979, a *pendente lite* hearing was held before a Domestic Relations Master who has no authority under local judicial rules to consider the merits of a contested divorce action.[3] After refusing to hear testimony relating to the merits of appellee's suit for

[2] This section is hereinafter referred to as Section 3-6A-06.

[3] Rules of the Sixth Judicial Circuit of Maryland, Rule S74b.

divorce, the Master recommended that appellee be granted custody of the children and *pendente lite* use of the family home and family use personal property. The Master also recommended that appellant pay $1,000.00 per month child support as well as the monthly mortgage on the family home. (E. 13-14).[4] However, the findings of fact upon which the Master's recommendations were based do not include a preliminary finding that there exist grounds for divorce, that the presence of appellant in the family home presented a danger to the health, safety, or welfare of appellee or the children of the parties, or the amount of money which would justly compensate appellant for the taking of his possessory interest in the family home and family use personal property.

The Circuit Court subsequently adopted the recommendations of the Domestic Relations Master in an order dated May 23, 1979. However, the Circuit Court's order modified these recommendations to award "exclusive" use of the family home and family use personal property to appellant (E. 17) thereby ripening the constitutional issues. The next day that court issued an order for appellant to show cause why he should not be held in contempt for failing to vacate the family home. Appellant filed an Opposition to Plaintiff's Petition to Hold Defendant in Contempt and raised the federal due process and just compensation issues:

* * *

5. § 3-6A-06 is unconstitutional in that it authorizes the taking of property without just compensation and due process required by the

---

[4](E.) refers to the pages of the record extract prepared by the parties for the Court of Appeals of Maryland.

Fifth and Fourteenth Amendments to the United States Constitution .... [E. 28]

* * *

Following the contempt hearing of May 26, 1979, the lower court expressly rejected appellant's constitutional arguments by ruling that Section 3-6A-06 does not violate the due process provisions of the federal and state constitutions or amount to an unlawful taking of private property. *See* opinion below, p. 17a, *infra.* Appellant vacated his home[5] on June 5, 1979 and filed an interlocutory appeal to the Court of Appeals of Maryland.[6] Appellant's brief reiterated the two constitutional issues raised in the Circuit Court as previously set forth in this Jurisdictional Statement. On January 31, 1980, the Maryland Court of Appeals filed its opinion which squarely faced the federal constitutional issues and which upheld the validity of Section 3-6A-06. *See* opinion below, p. 1a, *infra.* There has yet to be a trial on the merits of appellee's divorce action.

---

[5]Appellant was outraged by the Circuit Court's May 23, 1979 order which, although not based on a finding of marital fault on the part of appellant, deprived him of the custody of his children, of his home and possessions, and of two-thirds of his take-home pay. After vacating the family home, appellant refused to comply with the remaining portions of the May 23, 1979 order, including the portion requiring him to pay the mortgage on the family home. Appellant was incarcerated for ninety-nine days as a result of the subsequent civil contempt proceedings initiated by the appellee. During this period of incarceration appellant was fired, after twenty-six years of government employment, from his $50,000.00 per year position as Chief Engineer of the Navy Strategic Missile Program.

[6]The Maryland Court of Special Appeals, the intermediate Appellate Court, was bypassed when the highest Court of Maryland granted a petition for certiorari due to great public importance of the issues involved.

THE QUESTIONS ARE SUBSTANTIAL

I.

THE MARYLAND LAW AT ISSUE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT IT FAILS TO PROVIDE FOR A MEANINGFUL HEARING BEFORE DISPOSSESSING A SPOUSE OF HIS REAL PROPERTY.

Section 3-6A-06, which permits a *pendente lite* award of the family home to a petitioning spouse without a preliminary determination that there exist grounds for divorce or that the evicted spouse presents a danger to the health, safety, and welfare of the petitioning spouse or the children of the parties, violates the due process clause of the Fourteenth Amendment of the United States Constitution.

The Court of Appeals of Maryland conceded the existence of the prerequisites invoking the protection of the Fourteenth Amendment due process clause. First, appellant's dispossession of the family home and family use personal property constituted "state action" because it entangled the state in the Section 3-6A-06 *pendente lite* proceedings. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Second, appellant's dispossession of the family home and family use personal property was a significant taking even though the taking involved only a possessory interest and is possibly temporary. *Fuentes v. Shevin*, 407 U.S. 67 (1972). If there is state action depriving an individual of a significant property interest, due process requires a meaningful hearing (*Bell v. Burson*, 402 U.S. 535 (1971)), at a meaningful time. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Fuentes v. Shevin, supra.*

The *pendente lite* hearing was not a meaningful hearing because the Domestic Relations Master refused to permit

testimony pertaining to the merits of appellee's suit for divorce. It is clear that in a suit for divorce the existence of grounds for divorce is the ultimate and central issue.

The Court below cited *Lindsey v. Normet,* 405 U.S. 56 (1972), and *Bianchi v. Morales,* 262 U.S. 170 (1923) as authority for constitutionally limiting the issues at the *pendente lite* hearing to the considerations set forth in Section 3-6A-01(A)(1)-(4). However, these cases do not provide authority for eliminating from consideration, at a pre-dispossession hearing, the central and ultimate issue in the case. To the contrary, in *Lindsey v. Normet, supra,* this Court upheld a leasehold repossession statute which limited consideration at the pre-dispossession hearing to the very issue raised by the landlord's suit: whether the tenant failed to timely pay his rent.

The position of the Court of Appeals of Maryland that the central issue of a case can be avoided at the pre-dispossession hearing is contrary to the concept of "meaningful hearing" and is not in accord with the applicable decisions of this Court. In *Bell v. Burson, supra,* this Court considered a Georgia statute which required that the driver's license of an uninsured motorist involved in an accident be revoked unless he posted security sufficient to cover the amount of damages claimed by the aggrieved parties of the accident. The Court found this statutory scheme violated due process because the liability of the uninsured motorist was excluded from consideration at the Motor Vehicle Administration hearing. While this Court has previously determined that there may exist compelling circumstances warranting a pre-hearing seizure of property, an examination of these cases clearly demonstrates that such compelling circumstances do not exist in this case. *See,* e.g., *Calero-Toledo v. Pearson Yacht Leasing Company,*

416 U.S. 663 (1974) (seizure of yacht transporting marijuana); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (misbranded drugs); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (bank failure); *North American Cold Storage Company v. Chicago*, 211 U.S. 306 (1908) (contaminated foods). Arguably a pre-hearing seizure may be warranted if the presence of the spouse in the family home presents a danger to the health, safety and welfare of the spouse seeking the use and possession order or to the children of the parties. However, there was no such finding by the Domestic Relations Master and no such a finding is required by Section 3-6A-06.

This statutory scheme, which has few safeguards against abuse, permitted appellee to abandon the family home, to take the children, to file for a *pendente lite* use and possession order, and to oust appellant from the family home. And yet appellant, who may be completely innocent of any marital fault, can obtain no relief until the trial on the merits of the divorce action.

Appellant will be accorded the opportunity for the required meaningful hearing only when the trial on the merits is reached by the Circuit Court for Montgomery County, Maryland, in the regular course of administering its calendar. This trial has twice been postponed due to a crowded court docket. A trial on the merits which takes place more than a year after a significant deprivation is well beyond the period of delay rejected by this Court in *Fuentes v. Shevin, supra*, at 86:

> The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in

determining the appropriate form of a hearing, it is not decisive of the basic right to a prior hearing of some kind.

II.

THE MARYLAND LAW AT ISSUE PERMITS THE UNLAWFUL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

It is well-established that the due process clause of the Fourteenth Amendment requires a State to pay just compensation when it takes private property for a public purpose. *Chicago, Burlington & Quincy Railroad Co. v. Chicago,* 166 U.S. 226 (1897).

The State, through its entanglement in the Section 3-6A-06 *pendente lite* hearing, effectively takes from appellant his property by awarding to appellee the exclusive use and possession of appellant's home and family use personal property. This taking of appellant's property was not accomplished through the institution of formal eminent domain proceedings by the State. However, the institution of eminent domain proceedings by the State is not necessary for a taking of property. *United States v. General Motors Corp.,* 323 U.S. 373 (1945).

Although there is no taking of the ownership interest of appellant in the property, the requirement of just compensation for a constitutional taking of property is not contingent upon the taking of an ownership interest. This Court has recognized that a taking of property subject to a lease requires compensation to the tenant enjoying the leasehold interest. *United States v. General Motors Corp., supra.* It is clear that the taking of only a

possessory interest in property entitles the owner to just compensation. It is also clear that even the temporary taking of a possessory interest requires the payment of compensation to the owner. *United States v. General Motors Corp., supra.*

Appellant submits that he is entitled to compensation in the amount of the fair market value of his possessory interest in the family home.[7] However, there is no provision in Section 3-6A-06 for compensation to a spouse evicted from the family home. There was no finding of fact by the Domestic Relations Master of the amount necessary to justly compensate appellant for the taking of his family home. Instead of awarding just compensation to appellant, the Circuit Court ordered appellant to pay the monthly mortgage on the family home.

The Court of Appeals of Maryland found no taking of appellant's property because appellant's children were occupying his home. The Court concluded that appellant has not been deprived of all beneficial use of his property and is not entitled to compensation.

The lower court's reasoning is based on an apparent assumption that the State's activity is that of a noncompensable regulation of appellant's property under its police power. Whether the State's interference with private property is a noncompensable regulation or a taking can only be determined by examining the facts of each case. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978). Appellant respectfully submits that the State's physical intrusion on his property is not a regulation but is a taking of his property

---

[7] In fact, under principles of Maryland eminent domain law, he would receive additional compensation for relocation and assistance provided for in Md. R. P. Code Ann. 12-202 (a).

entitling him to compensation. *Causby v. United States*, 328 U.S. 256 (1946).

III.

THIS CASE IS IMPORTANT.

In 1978, approximately 1,128,000 marriages were dissolved by divorce or annulment in the United States. In 1979, this number increased to 1,170,000.[8] It is clear that in the United States in 1980 a divorce action has ceased to be a rare or exceptional legal proceeding. Thus, the implications of this case render it one of generic importance to a major segment of this country's population.

This population segment is becoming significant in that the Maryland Property Disposition in Divorce and Annulment Act represents a developing trend in the treatment of pending divorce actions by numerous state legislatures. At this time, there are at least thirteen states permitting the *pendente lite* ouster of a spouse from the family home.[9] None of these statutes requires a showing of probable grounds for divorce. Two statutes, like Maryland's, do not even require a showing that the petitioning party or the children of the parties is endangered by the presence of the opposing spouse in the

---

[8]Nat'l Center for Health Statistics, Monthly Vital Statistics Report, Provisional Statistics (DHEW Pub. No. (PHS) 80-1120, 1980).

[9]Cal. Civil Code, § 4359(a); Colo. Rev. Stat., § 14-10-108(2); Conn. Gen. Stat., § 46b-83; Del. Code Ann., tit. 15, § 1509(a)(5); Ill. Rev. Stat., ch. 40, § 701; Me. Rev. Stat. Ann., tit. 19, § 722-B; Md. Cts. & Jud. Proc. Code Ann., § 3-6A-06; Mass. Gen. Laws Ann., ch. 208, § 34B (West); Mo. Rev. Stat., § 452.315 2(3); Mont. Rev. Codes Ann., § 40-4-106(2)(c); N.H. Rev. Stat. Ann., § 458.16; Wash. Rev. Code, § 26.09.060(2)(c); W. Va. Code, § 48-2-13.

family home.[10] The sanction by the Court of Appeals of Maryland of the constitutionality of Maryland's statute renders the statute an appealing model for additional states desiring to legislate an easy method of providing temporary shelter to a party awaiting the resolution of a divorce action.

In light of the predictable acrimony involved in a contested divorce action and in light of the failure of these statutes to adequately protect innocent spouses against abuse, these statutory schemes provide a great potential for the infringement of individual constitutional rights.

This case is a specific demonstration of the injustice and unfairness accruing to an individual whose constitutional right to be heard has been infringed. Appellant was forbidden even to preliminarily dispute the merits of his spouse's divorce action and he was stripped of his home and his possessions. The Maryland statute enforces the shattering of appellant's family by prohibiting him from visiting his children in his own home. Appellant had no meaningful say in his dispossession and he has no recourse. And yet Appellant has consistently professed his willingness to reconcile with his wife; *see e.g.*, (E. 9). This statute is repugnant to the concept of fair play encompassed in the due process clause because it permits the grossest of deprivations on the mere assertion by a party that he or she has grounds for divorce.

This case represents the first constitutional test of a radically new statute which substantially alters the right

---

[10] Conn. Gen. Stat., § 46b-83; Md. Cts. & Jud. Proc. Code Ann., § 3-6A-06; W. Va. Code, § 48-2-13.

of a spouse to occupy his or her home prior to a decree of divorce. It is a case of significant public interest so as to require plenary consideration of the Supreme Court of the United States.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

JOHN G. GILL, JR.
ELLEN ANN CALLAHAN
17 West Jefferson Street
Rockville, Maryland 20850
(301) 340-9444
Attorneys for Appellant

APPENDIX

APPENDIX A

John W. PITSENBERGER

v.

Mary W. PITSENBERGER,

No. 80.

Court of Appeals of Maryland.

Jan. 31, 1980.

Ellen Ann Callahan, Rockville (Gill & Sippel, Rockville, on brief), for appellant.

Vincent E. Ferretti, Jr., Rockville (Ferretti, Ehrlich & Gordon, Rockville, on brief), for appellee.

Argued before MURPHY, C.J., and SMITH, DIGGES, ELDRIDGE, ORTH,* COLE and DAVIDSON, JJ.

MURPHY, Chief Judge.

This is the first case in which we consider the constitutionality of Maryland's new legislation on property disposition in divorce and annulment – ch. 794 of the Acts of 1978, now codified as Maryland Code (1974), 1979 Cum.Supp. §§3-6A-01 to 3-6A-07 of the Courts and Judicial Proceedings Article. More specifically, two questions are raised for our determination:

> 1. Does §3-6A-06, on its face, violate procedural due process by authorizing a pendite lite use and possession award of the family home and other property without a preliminary showing by the petitioning spouse that grounds exist for a divorce?

---

*Orth, J., participated in the hearing of the case and the conference in regard to its decision but retired prior to the adoption of the opinion by the Court.

2. Does §3-6A-06 permit the unlawful taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, Article 24 of the Maryland Declaration of Rights,[1] and Article III, §40 of the Maryland Constitution?

John and Mary Pitsenberger were married on June 30, 1962, in Alexandria, Virginia. Five children were born as a result of the marriage. In August of 1978, Mary left the family, home in Rockville, Maryland, taking two of the parties five minor children and $10,000 from the parties' joint savings account. About one month later, the other three children went to live with Mary in a small three bedroom townhouse in Derwood, Maryland. Mary rented the house on a month-to-month lease, but she was informed that the lease would not be renewed after May of 1979. While living with Mary, the children remained enrolled in the neighborhood schools near the family home. Mary drove them to school each day.

On January 2, 1979, Mary filed a bill of complaint for a divorce *a mensa et thoro* on the grounds of constructive desertion in the Circuit Court for Montgomery County. She sought pendite lite custody of the children, child support, alimony and, pursuant to §3-6A-06(d), an exclusive use and possession order for the family home and family use personal property (furniture, applicances, household furnishings and a 1973 Dodge Dart). On February 9, 1979, John filed his answer and a cross-bill of complaint for divorce *a mensa et thoro* on the grounds of desertion.[2]

---

[1] Formerly Article 23 until changed by constitutional amendment, ratified November 7, 1978. *See* chapter 681 of the Acts of 1977.

[2] John filed a petition on April 19, 1979 to dismiss his cross claim for divorce without prejudice.

On February 16, 1979, a hearing was held before a domestic relations master to determine pendite lite the issues of child custody and support, alimony, and the need of the parties and the children to remain in the family home. Mary testified that she was on welfare and lacked funds to rent another house or apartment. Despite John's yearly salary of approximately $47,000, she said she had received no child support since August, 1978. With respect to alternative living arrangements, Mary explained that her mother's residence, a small three bedroom house in Alexandria, Virginia, provided insufficient living room for her family. The only other alternative was to stay at the three bedroom house of her brother-in-law and his wife and two children. Even if they could reside there on an emergency basis, she would have to drive each day from Bowie, Maryland to the children's schools. Other testimony was heard respecting the fitness of each party to have custody of the children. A Court Investigator's report indicated that all of the children expressed a strong desire to live with their mother. The master refused to hear testimony pertaining to the merits of Mary's suit for divorce.

The master recommended that Mary be awarded pendente lite custody of the minor children and that John pay $1,000 per month child support, as well as pay the mortgage, taxes and insurance for the family home. The master also recommended that Mary be awarded pendente lite use of the family home, the family personal property located in the home and the Dodge Dart, but recommended that Mary be denied temporary alimony and initial counsel fees. These recommendations were adopted by the circuit court on May 23, 1979, and its order specified that Mary was awarded the *exclusive* use of the family home.

On May 24, 1979, an order was issued requiring John to show cause why he should not be held in contempt for failing to vacate the family home. In response to Mary's petition to hold him in contempt, John raised the constitutional issues upon which he now appeals. Following a contempt hearing, the circuit court (Mathias, J.) ruled that §3-6A-06, on its face, does not violate the due process provisions of the federal and state constitutions, and does not sanction the unlawful taking of private property without payment of just compensation. On June 5, 1979, John vacated the family home. We granted certiorari prior to determination by the Court of Special Appeals of John's appeal from the order of the circuit court.[3]

I.

The new statute has governed property disposition in divorce and annulment actions since its effective date of January 1, 1979. In a preamble to the statute, the General Assembly declared that

> " ' . . . it is the policy of this State that marriage is a union between a man and a women having equal rights under the law. Both spouses owe a duty to contribute his or her best efforts to the marriage, and both, by entering into the marriage, undertake to benefit both spouses and any children they may have.
>
> 'The General Assembly declares further that it is the policy of this State that when a marriage is dissolved the property interests of the spouses should be adjusted fairly and equitably, with careful consideration being given to both monetary and nonmonetary contributions made by the respective spouses to the well-being of the family, *and further, that if there are minor*

[3]The appeal was taken pursuant to §12-303(a) of the Courts Article.

> *children in the family their interest must be given particular and favorable attention.*' " (Emphasis added.)

The statute changes Maryland law by empowering courts to distribute assets acquired during marriage through monetary awards, §3-6A-05, and use and possession orders of certain property, §3-6A-06. The legislation recognizes nonmonetary as well as monetary contributions to a family, § 3-6A-05(b)(1), and authorizes courts to equitably distribute property acquired during marriage, §3-6A-05(b)(9). The statute provides various factors to be considered in granting to a spouse with custody of a minor child use and possession awards of the family home and personal property used in the home. *See generally,* Comment, *Property Disposition Upon Divorce in Maryland: An Analysis of the New Statute,* 8 U.Balt.L.Rev. 377 (1979).

This case involves only those sections of the statute that pertain to pendente lite use and possession awards. Section 3-6A-06 is applicable to disposition of the family home and family use personal property. Definitions of the "family home" and "family use personal property" are provided in §3-6A-01(b) and (c), respectively. The family home is defined as property in Maryland that:

> "(1) was used as the principal residence of the spouses when they lived together, (2) at the time of the proceeding is owned or leased by at least one of the spouses, and (3) is being used or will be used by at least one of the spouses and a minor child as their principal residence."

Excluded from this definition is property acquired prior to the marriage, property acquired by inheritence or gift from a third party, or property excluded by a valid agreement. The term "family use personal property" is defined to encompass:

"tangible personal property, acquired during the marriage, owned by either spouse or owned jointly by both spouses, and used primarily for family purposes. It includes motor vehicles, furniture, furnishings, and household appliances."

This definition also excludes property acquired by inheritance or gift from a third party or property excluded by valid agreement.

Section 3-6A-06(a) directs that a family home and family use personal property should be disposed of in such a manner as to

"permit the children of the family to continue to live in the environment and community which is familiar to them and to permit the continued occupancy of the family home and possession and use of family use personal property by a spouse with custody of a minor child who has a need to live in that home."

Section 3-6A-06(d) provides for a preliminary determination as to the property which constitutes the family home and the family use personal property, and authorizes a court to exercise pendente lite powers over these types of property. In exercising this authority, a court is directed by §3-6A-06(a) to consider the following factors:

"(1) The best interests of any minor child;

(2) The respective interest of each spouse in continuing to use the family use personal property or occupy or use the family home or any portion of it as a dwelling place;

(3) The respective interest of each spouse in continuing to use the family use personal property or occupy or use the family home or any part of it for the production of income;

(4) Any hardship imposed upon the spouse whose interest in the family home or family use personal property is infringed upon by an order issued under this section."

A temporary or a final order concerning the family home or family use personal property may not exceed a three-year period from the time an absolute or limited divorce or annulment is granted. § 3-6A-06(e). There is no provision for a preliminary determination of the existence of grounds for a divorce.

II.

John argues that § 3-6A-06(d) violates his right to procedural due process guaranteed by the Fourteenth Amendment of the federal constitution and Article 24 of the Maryland Declaration of Rights. He claims that he was deprived of the use of his home without a preliminary determination that Mary has grounds for a divorce.

Preliminarily, it should be pointed out that Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constituion have the same meaning, and that Supreme Court interpretations of the Fourteenth Amendment function as authority for interpretation of Article 24. *Barry Properties v. Fick Bros.*, 277 Md. 15, 22, 353 A.2d 222 (1976); *Bureau of Mines v. George's Creek*, 272 Md. 143, 156, 321 A.2d 748 (1974).

Several issues are presented when analyzing a contention that a state has deprived one of his property without due process of law, *see generally, Riger v. L & B Ltd. Partnership*, 278 Md. 281, 288-89, 363 A.2d 481 (1976), but before discussing these issues it should be made clear that John's argument is based on a violation of procedural due process rather than substantive due process.

Indeed, John makes no contention that the legislature acted arbitrarily in enacting the family home and family use personal property provisions contained in §3-6A-06. *See Governor v. Exxon Corp.*, 279 Md. 410, 423-26, 370 A.2d 1102 (1977), *aff'd*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978).

The first prerequisite to raising a due process argument is that the action complained of must constitute "state" action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *Barry Properties v. Fick Bros., supra*, 277 Md. at 22-23, 353 A.2d 222. Next, the state action must result in a "deprivation" of the complainant's interest, *Fuentes v. Shevin*, 407 U.S. 67, 84, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Barry Properties v. Fick Bros., supra*, 277 Md. at 23, 353 A.2d 222; and such interest must be a "property" interest within the meaning of the due process clause. *Goss v. Lopez*, 419 U.S. 565, 576, 95 S.Ct. 729, 737, 42 L.Ed.2d 725 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 569-72, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Fuentes v. Shevin, supra*, 407 U.S. at 84. Finally, if state action deprives one of a property interest, the court must balance the various interests at stake in order to determine the procedural due process which is constitutionally required under the circumstances. *Hortonville Dist. v. Hortonville Ed. Assn.*, 426 U.S. 482, 494-96, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 332-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Goss v. Lopez, supra*, 419 U.S. at 577-80, 95 S.Ct. 729; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604, 607, 610, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974).

It is clear that the remedy of §3-6A-06 involves state action because it is created, regulated and enforced by the State. *See Barry Properties v. Fick Bros., supra*, 277

Md. at 22-23, 353 A.2d 222 (mechanics' liens involve state action). There appears to be no significant difference in the degree or type of state participation in §3-6A-06 proceedings as compared with the statutes permitting seizure of property pendente lite that the Supreme Court has voided on due process grounds. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) (garnishment); *Mitchell v. W.T. Grant Co., supra* (sequestration under a vendor's lien); *Fuentes v. Shevin, supra* (replevin); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (garnishment). Obviously, in voiding these statutes, the Court necessarily concluded that those prejudgment remedies sufficiently involved the state so as to activate due process protections. Section 3-6A-06 effectively creates a right in one tenant to remove a cotenant from property owned by tenants by the entirety, and thereby totally entangles the State in §3-6A-06 pendente lite proceedings. The enforcement provision of the statute, §3-6A-07(a), states: "An order, award, or decree entered under this subtitle may be enforced in accordance with the Maryland Rules." In order to enforce a use and possession order, a court may direct the sheriff to eject an objecting spouse from the family home. Thus, §3-6A-06 pendente lite determinations, created, regulated and enforced by the State, sufficiently involve state action so as to activate Fourteenth Amendment protection.

The second prerequisite to the applicability of procedural due process protections in this case is "deprivation" of property. *See Fuentes v. Shevin, supra,* 407 U.S. at 84-86, 92 S.Ct. 1983. John's property interest in the family home originates from a deed granted to him and his wife as tenants by the entirety. The family use personal property consists of property purchased by

John and Mary during their seventeen-year marriage. Although the use and possession order obtained by Mary deprived John of his possession but not his title to the family home and family use personal property, the Supreme Court has held that possessory interests in property are within the protection of the Fourteenth Amendment. *Id.*

The fact that John's dispossession of the family home and the family use personal property may be temporary does not render due process requirements inapplicable. John's dispossession may be considered temporary in the sense that he may regain possession of his property if Mary fails to prove grounds for a divorce. Furthermore, if Mary successfully establishes grounds for divorce, John may regain the use of his property if he is awarded custody of the children. §3-6A-06(a). In any event, the Supreme Court has pointed out that "a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Fuentes v. Shevin, supra,* 407 U.S. at 85, 92 S.Ct. at 1996. *See Sniadach v. Family Finance Corp., supra; Bell v. Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). As of December 31, 1979, John has been dispossessed of his property for over six months. With respect to the length of a deprivation, the Supreme Court said in *Fuentes, supra,* 407 U.S. at 86, 92 S.Ct. at 1997:

> "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind."

Thus, John's possessory interest in the family home and family use personal property is entitled to the protection of procedural due process of law.

Once it is determined that an interest is entitled to due process protection, the pertinent inquiry then becomes what process is due. *Goss v. Lopez, supra,* 419 U.S. at 577, 95 S.Ct. at 738. The Supreme Court has recognized that interpretation of the due process clause is a practical matter which must be approached with the realization that due process "negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). Determing what process is due requires consideration and accommodation of both the government and private interests. *Hortonville Dist. v. Hortonville Ed. Assn., supra,* 426 U.S.at 494, 96 S.Ct. 2308. This essentially involves balancing the various interests at stake. *Riger v. L & B Limited Partnership, supra,* 278 Md. at 289, 363 A.2d 481. At a minimum, due process requires that a deprivation of property be preceded by " ' . . . notice and opportunity for hearing appropriate to the nature of the case.' " *Goss v. Lopez, supra,* 419 U.S. at 579, 95 S.Ct. at 738 (quoting *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). Fundamentally, due process requires the opportunity to be heard " 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge, supra,* 424 U.S. at 333, 96 S.Ct. at 902 (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

John argues that procedural due process requires a hearing before a spouse can obtain pendente lite the family home and family use personal property. He further asserts that a pendente lite hearing, in order to be

meaningful, must inquire into the probability that a spouse seeking a use and possession order will ultimately succeed on the merits of the divorce action. Otherwise, he believes, a party may obtain pendente lite that which he could not obtain if there were no grounds for divorce: the exclusive use of the family home and family use personal property. In sum, John argues that the § 3-6A-06(d) hearing was meaningless because it avoided what he considers to be the very subject of dispute, namely, whether Mary had grounds for a divorce.

In addressing John's attacks on the constitutionality of §3-6A-06, we begin by considering the nature of his interests at stake. Next, John's interests in obtaining a hearing on the probable grounds for divorce prior to a pendente lite award must be weighed against the State's interest in implementing the procedure specified in §3-6A-06. It should also be recognized that the State's interest, under the facts of this case, is essentially the same as the interest of Mary and the parties' children.

John's interest is not to be deprived of the use of his home and family use personal property without a prior hearing which establishes that Mary has probable grounds for divorce. His interest is to avoid the hardship and expense imposed on a parent who is ordered to give exclusive use of the home to his children and the parent who has been awarded custody. John argues that §3-6A-06 pendente lite determinations may cause gross injustice. He asserts that this section permits a spouse to leave the family home, without grounds for divorce, and to take the minor children and request a pendente lite use and possession decree in order to evict his spouse from the family home. Due to crowded court dockets, he claims that the evicted spouse is prevented from obtaining immediate relief from this hardship.

In opposition to John's interests, the State's interest is to ensure that when a marriage is dissolved, the interests of minor children in the family are given "particular and favorable attention" – this being the policy of the State as declared by the General Assembly in the preamble to the statute. In enacting §3-6A-06, the State's provision of pendente lite use and possession awards is intended to give special attention to the needs of minor children to continue to live in a familiar environment for the temporary duration of the pendente lite period. The procedure provided for in §3-6A-06 seeks to avoid uprooting the children from the home, school, social and community setting upon which they are dependent, especially during the period of parental separation. During this period, due to the contentious behavior of the parents, the children have the greatest need for a stable environment to help them overcome the family instability. Finally, to be considered in conjunction with the State's and children's interests in the pendente lite procedure, Mary also has an interest in continuing to occupy the family home, which she owns with John as a tenant by the entirety.

The legislature was aware in enacting §3-6A-06 that conflicting interests must be considered and accommodated prior to pendente lite use and possession awards. This accommodation of interests is reflected in §3-6A-06(a) which ensures fairness by requiring a court to weigh various needs and interests of the spouses and the children. Prior to a pendente lite determination, which is subject to later modification, a court must consider the best interests of the children, the interests of each spouse in continuing to use the family home for a dwelling place or for production of income, and finally the court must consider any hardship on the spouse whose interest in the

family home or family use personal property would be interfered with by a pendente lite award. §3-6A-06(a)(1)-(4).

Notwithstanding this procedure, which is carefully designed to accommodate the conflicting interests present pending dissolution of a marriage, John asserts that the pendente lite hearing is meaningless because the existence of probable grounds for a divorce is not a matter that must be considered prior to a pendente lite award. In other words, John argues that §3-6A-06 pendente lite determinations violate procedural due process because of the legislature's decision to restrict the pendente lite hearing to a consideration of the interests specified in section 3-6A-06(a)(1)-(4). It has been established, however, that a state may properly limit the issues which may be raised at a hearing prior to a proposed deprivation of interests, if (1) the previously ignored issue may be raised at a subsequent hearing, and (2) the postponement furthers an important state purpose. *See Lindsey v. Normet,* 405 U.S. 56, 64-69, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972); *Bianchi v. Morales,* 262 U.S. 170, 171, 43 S.Ct. 526, 67 L.Ed. 928 (1923); L. Tribe, *American Constitutional Law* 552-53 (1978).

With respect to the first requirement that must be fulfilled in order to properly limit the issues that may be raised at a predeprivation hearing, John's concern that no grounds for a divorce exist will be considered at the adversary hearing on the merits of Mary's divorce complaint. Section 3-6A-06 pendente lite determinations also satisfy the second requirement. In enacting §3-6A-06, the legislature decided not to require a preliminary finding of grounds for divorce as a prerequisite to a pendente lite award. Imposing the additional requirement that probable grounds for divorce be proven would seriously

impair the effectiveness of the statute in protecting the children's welfare. In many cases, the existence of grounds for a divorce cannot be proven until a final divorce trial. Section 3-6A-06 is designed to ensure that minor children need not suffer up to the point when grounds for a divorce may be proven. Because the main purpose of §3-6A-06 is protection of the children's interests, the children must be permitted to reside in the family home regardless of the existence of probable grounds for a divorce.[4] In conclusion, pendente lite use and possession orders awarded after a consideration of the four elements in §3-6A-06(a) satisfy procedural due process by effecting a constitutional accommodation of opposing interests.

III.

John next argues that § 3-6A-06 permits the unlawful taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, Article 24 of the Maryland Declaration of Rights, and Article III, section 40 of the Maryland Constitution.[5] John contends that the use and possession order signed by the court on May 23, 1979 effectively takes his property by awarding Mary the exclusive use of the family home and family use personal

---

[4]John also baldly asserts, without supporting argument that he should not have been evicted from the family home absent a finding that he endangered the health, safety or welfare of his children or spouse. In response to this assertion, it should be recognized that section 3-6A-06(a) satisfied the requirements of procedural due process through its provision of the four elements that must be considered prior to a pendente lite award.

[5]Article III, §40 and the Fourteenth Amendment have the same meaning in reference to a "taking" of property. *Bureau of Mines v. George's Creek, supra,* 272 Md. at 156, 363 A.2d 481.

property. John asserts that he is entitled to compensation in the amount of the fair market value of his possessory interest in the family home and for relocation expenses.

To constitute a taking in the constitutional sense, so that the State must pay compensation, the state action must deprive the owner of all beneficial use of the property. *Md.-Nat'l Cap. P. & P. Comm'n v. Chadwick,* 286 Md. 1, 10-11, 405 A.2d 241 (1979); *Governor of Maryland v. Exxon Corp., supra,* 279 Md. at 437, 370 A.2d 1102. As these cases indicate, it is not enough for the property owner to show that the state action causes substantial loss or hardship. John, as guardian of his minor children, is charged with their support, care and welfare. Maryland Code (1957, 1978 Repl. Vol.), Art. 72A, §1. Because his children have the use of the family home and family use personal property, John is in fact using his property to properly house his children. John therefore has not been deprived of all beneficial use of his property. In sum, the use and possession order does not amount to a "taking" of private property in violation of the federal or state constitutions.[6]

We thus conclude that Mary was properly awarded pendente lite use and possession of the family home, and family use personal property.

ORDER AFFIRMED, WITH COSTS.

---

[6] Because we have not found a "taking" in the constitutional sense, it is unnecessary to address John's argument that his property was taken for the private use of another.

APPENDIX B

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND
Sitting as a Court of Equity

Equity No. 65624

[Filed: May 31, 1979]

MARY W. PITSENBERGER,
Plaintiff,

v.

JOHN W. PITSENBERGER,
Defendant.

MEMORANDUM OPINION AND ORDER

Defendant husband is in possession of the "family home" and has made it clear that he will not voluntarily yield exclusive possession to his wife who has obtained a *pendente lite* order requiring him to do so. The upshot is that he has been brought into court on a contempt citation. His defense is that the "family home" section of the new act on property disposition in divorce and annulment cases is unconstitutional.

The subject property in this case meets the definition of "family home" as set out in Section 3-6A-01 CJ. It is owned as tenants by the entireties and was the principal residence of the parties and their five children when they lived together before August 19, 1978, when the wife left, allegedly because of her husband's cruel and vicious conduct.

Section 3-6A-06 and subsections (c)(1)(d) are the particular portions of the property disposition act which are alleged to be unconstitutional. Subsection (c)(1) reads:

> "Regardless of how the family home or family use personal property is titled, owned or leased, the court may decide that one of the parties shall have the sole continued possession and use of that property or it may divide the possession and use of the property between them."

Subsection (d) reads:

> "The court may make a preliminary determination of which property is the family home or family use personal property and may exercise *pendente lite* the powers over the family home and family use personal property which are granted in this section. These preliminary and *pendente lite* determinations are subject to modificiation during the pendency of the proceeding."

The defendant relies on subsection (b) for the proposition that the court may only exercise such power over real property "when granting a limited or absolute divorce or annulment." Such is not our interpretation of the statute. We must look at the statute as a whole and attempt to harmonize its parts. It seems clear to us that the legislature meant to give the court power over real property used as a family home not only when granting a divorce or annulment but also preliminarily by way of a *pendente lite* order.

The defendant also attacks the law on due process grounds, alleging an unconstitutional taking of property prior to a hearing and determination of the basic issue of whether plaintiff is entitled to a divorce. Defendant cites as authority the Fifth and Fourteenth Amendments

to the Federal Constitution and Article 23 of the Maryland Declaration of Rights. We reject the notion that due process requires first a determination that the plaintiff is entitled to a divorce. The legislature has specifically declared the courts may *pendente lite* exercise the power granted over the "family home."

Defendant points out abuses may occur, as, for example, a fraudulent claim for divorce for the purpose of expelling a spouse from the marital home. But there is the possibility of abuse in all *pendente lite* orders. We point out, however, that in the statute under review there is a safeguard. Subsection (d) says "*pendente lite* determinations are subject to modification during the pendency of the proceeding."

It is true that historically "the estate by the entireties in Maryland has all its common law incidents." *Foland v. Hoffman,* 186 Md. 423. But common law rights are subject to change by the legislature. *Basta v. State,* 133 Md. 568.

While in accordance with the common law our courts have always held to the concept that neither tenant by the entireties may dispossess the other, there is no bar to the legislature changing this concept, as has been done in new subtitle 6A.

The defendant here was afforded a hearing before the Master on a show cause order that put him on notice that the court would be asked to grant plaintiff and her children the right to possesss and use the "family home."

We cannot agree with defendant that the new property disposition law in divorce and annulment cases violates the due process provisions of the federal or state constitution or amounts to an unlawful taking of private property.

The new law contains no specific recital of sanctions that may be used. We shall assume it was the legislative intent that the court's usual contempt power be used in appropriate cases to enforce its orders. We cannot say here that the defendant has willfully and deliberately violated the *pendente lite* order of this court because he may have been under an honest misapprehension as to the meaning of the law. Therefore, we shall not find him in contempt but shall instead order him by 12:00 noon on June 5, 1979, to deliver to his wife and five children exclusive possession of the home at 14937 Walkerway Drive (sic), Rockville, Maryland. His failure to do so shall be regarded as a contempt punishable under the contempt power of this court.

So ORDERED this 29th day of May, 1979.

/s/ Joseph M. Mathias
Judge of the Circuit Court for
Montgomery County, Maryland

APPENDIX C

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Equity No. 65624

[Filed: April 21, 1980]

MARY W. PITSENBERGER,
Plaintiff,

v.

JOHN W. PITSENBERGER,
Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John W. Pitsenberger, Defendant in the above-entitled case and appellant in Appeal No. 80 in the Court of Appeals of Maryland, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland filed January 31, 1980 holding constitutional Section 3-6A-06, Courts and Judicial Proceedings, Annotated Code of Maryland.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ Ellen Ann Callahan
Attorney for Defendant/Appellant
17 West Jefferson Street
Rockville, Maryland 20850
(301) 340-9444

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Vincent E. Ferretti, Jr., Attorney for Appellee, by placing said copy in an envelope with first class postage prepaid addressed to said attorney at 416 Hungerford Drive, Rockville, Maryland 20850, which is his post office address, and by depositing said envelope and its contents in a United States mail box in Rockville, Maryland, this 21st day of April, 1980. All parties required to be served have been served.

/s/ Ellen Ann Callahan
Attorney for Defendant/Appellant
17 West Jefferson Street
Rockville, Maryland 20850
(301) 340-9444

APPENDIX D

STATUTES AND RULES

Subtitle 6A. Property Disposition in Divorce and Annulment, Courts and Judicial Proceedings, Annotated Code of Maryland.

§ 3-6A-01. ***Definitions.***

(a) *In general.*—As used in this subtitle, the following words have the meanings indicated:

(b) *Family home.*—"Family home" is the property in this State that: (1) was used as the principal residence of the spouses when they lived together, (2) at the time of the proceeding is owned or leased by at least one of the spouses, and (3) is being used or will be used by at least one of the spouses and minor child as their principal residence. It does not include property acquired prior to the marriage, property acquired by inheritance or gift from a third party, or property excluded by valid agreement.

(c) *Family use personal property.*—"Family use personal property" is tangible personal property, acquired during the marriage, owned by either spouse or owned jointly by both spouses, and used primarily for family purposes. It includes motor vehicles, furniture, furnishings, and household appliances. However, it does not include property acquired by inheritance or gift from a third party, or property excluded by valid agreement.

* * *

§ 3-6A-06. ***Family Home; Family Use Personal Property.***

(a) The authority conferred by this section shall be exercised to permit the children of the family to continue to live in the environment and community which is familiar to them and to permit the continued occupancy of the family home and possession and use of family use personal property by a spouse with custody of a minor child who has a need to live in that home. However the use, occupancy, and possession of the family home may not be continued under the authority conferred by this section if the spouse having the use, occupancy, and possession remarries; and also the use and possession of family use personal property may not be continued under the authority conferred by this section if the spouse having the use and possession remarries. In exercising its authority under this section, the court shall consider each of the following factors:

(1) The best interests of any minor child;

(2) The respective interest of each spouse in continuing to use the family use personal property or occupy or use the family home or any portion of it as a dwelling place;

(3) The respective interest of each spouse in continuing to use the family use personal property or occupy or use the family home or any part of it for the production of income;

(4) Any hardship imposed upon the spouse whose interest in the family home or family use personal property is infringed upon by an order issued under this section.

(b) When granting a limited or absolute divorce, or annulment, the court may determine which property is the family home and family use personal property.

(c)(1) Regardless of how the family home or family use personal property is titled, owned, or leased, the court may decide that one of the parties shall have the sole possession and use of that property, or it may divide the possession and use of the property between them.

(2) The court may also order either or both of the parties to pay all or any part of any mortgage payments or rent, all or any part of the indebtedness related to the property, the cost of any maintenance, insurance, assessments and taxes, and any other similar expenses in connection with the property.

(d) The court may make a preliminary determination of which property is the family home or family use personal property, and may exercise pendente lite the powers over the family home and family use personal property which are granted in this section. These preliminary and pendente lite determinations are subject to modification during the pendency of the proceeding.

(e) Any provision in any temporary or final order or decree concerning the family home or family use personal property is subject to the terms and conditions and limited to the period of time specified by the court, and is subject to modification or dissolution by the court, as the circumstances and justice may require. However, any such order or decree or any modification thereof concerning the family home or family use personal property shall be made for a time

period not to exceed 3 years from the date of the granting of the limited or absolute divorce, or annulment. Nevertheless, if the provision concerning the family home or family use personal property is a part of an order or decree incident to a divorce a mensa et thoro, the provision may not subsequently be extended for an additional period of time as part of an order or decree incident to a divorce a vinculo matrimonii.

(f) Upon the termination of an order issued under this section of the family home or family use personal property, the property shall be treated as marital property if it so qualifies, and the court shall consider the factors set forth in § 3-6A-05(b) in arriving at a division of the proceeds or value of the property. If however, the family home or the item of family use personal property was acquired by one of the parties before marriage or by inheritance, or was acquired by gift by one of the parties from a third party or was excluded by valid agreement, then upon termination of the order the property shall be awarded to the party who owns it.

(g) If the court determines that there is no need for an order issued under this section regarding the family home or all or any items of family use personal property, the property shall be treated as marital property if it would otherwise have been treated as marital property.

§ 3-6A-07. *Enforcement.*

(a) An order, award, or decree entered under this subtitle may be enforced in accordance with the Maryland Rules.

* * *

RULES OF THE SIXTH JUDICIAL CIRCUIT OF MARYLAND, RULE S74.

a. Scope.

In Counties having a full-time Domestic Relations Master, or Masters, this rule shall apply. (Revised July 1, 1971)

b. Referral.

The Court, in its discretion, shall direct the Clerk to refer to the Domestic Relations Master actions in which a hearing has been requested, including but not limited to the following. A bill or petition:

(i) for alimony pendente lite; or for support, custody and visitation of children pendente lite, or for initial counsel fee;

(ii) for modification of existing orders or decrees to increase or decrease the amount of alimony or child support, or to change the custody of minor children or provisions for child visitation;

(iii) for divorce, annulment, custody or separate maintenance in which there is a decree pro confesso or where the action is at issue as a result of an answer having been filed but in which there is no actual contest and where the parties have not specifically requested a hearing before the Court; however, in cases where an answer has been filed but there is no actual contest, the file shall not be referred to the Domestic Relations Master until both counsel have filed with the Clerk a praecipe (or praecipes) stating that there is no actual contest as to any issue;

(iv) originally seeking separate maintenance, ali-

mony or child support wherein it is the amount thereof and not the right thereto that is actually contested.

(v) filed pursuant to the Uniform Reciprocal Enforcement of Support Act (Article 89C) where this State is the initiating State or the responding State.

* * *